In The

Supreme Court of the United States

October Term, 1974

No. 74-1261

BIAGGIO BARRASSO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In The

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No.

BIAGGIO BARRASSO,

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vs.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States

Your petitioner, Biaggio Barrasso, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on March 10, 1975, which judgment affirmed a judgment of sentence of the United States District Court for the District of New Jersey filed September 23, 1974.

CITATIONS TO OPINIONS BELOW

The Court of Appeals did not render an opinion in this case but affirmed the judgment of conviction by judgment order. That order is printed in Appendix B, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on March 10, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Was the trial court not in error in charging the jury that it could consider hearsay statements of co-conspirators, in addition to evidence of petitioner's own acts and statements, in determining whether petitioner became a member of the conspiracy charged in the indictment?

2. Did the trial court not err in receiving numerous hearsay statements in evidence against petitioner without giving the jury any cautionary instruction, at the time the evidence was received, that such evidence could not be used to establish petitioner's membership in the conspiracy charged?

3. Did not the admission of seven year old "other crime" evidence without cautionary or limiting instruction of any kind deny petitioner due process of law?

STATUTES INVOLVED

The statutory provision involved is 18 U.S.C. Section 894. It is printed in Appendix A, *infra*.

STATEMENT

Petitioner and two others were convicted of conspiring to participate in the use of extortionate means to collect a gambling debt from one Rocco Mancinelli. Petitioner received a four year prison sentence.

The government's case was built primarily upon the testimony of Rocco Mancinelli, the victim of the alleged extortionate collection practices charged in the indictment. Significantly, however, Mancinelli never had any contact with the defendant Barrasso. Barrasso's only direct contact was one brief encounter with Mancinelli's wife. Other conspirators, many of whose conversations with Mancinelli were recorded, did mention Barrasso's name.

Mancinelli testified that he had been a gambler for over forty years, betting on both horses and sports (T81).[1] Mancinelli had been introduced to the co-defendant DiMeo, known as Chubby, in the latter part of August, 1972 (T81-83). At that time he began to gamble on sporting events with DiMeo (T83), who gave him a telephone number which he used to call in his bets (T83). When he first started to bet with DiMeo, Mancinelli was required to put up a deposit of $3,000, which he lost in one or two days of gambling. Mancinelli thereafter continued to bring

1. "T" references are to the trial record.

additional money to DiMeo (T87), finally losing $6,000. After losing all this money he continued to bet and lost another $2,400. At that point he was unable to bet any longer because he had no funds (T88). He stopped placing bets with DiMeo about the first week of October, 1972 (T88). Thereafter, DiMeo called Mancinelli to ask him for his money. In one of their first conversations DiMeo told Mancinelli that "Barrasso is my partner" (T89). Mancinelli told DiMeo that if he had known that Barrasso was his partner he would never have placed bets with him, as a result of previous experiences he had had with Barrasso (T89). Mancinelli was then permitted to relate two incidents, which had taken place about seven years before, when Barrasso had threatened him as a result of money that he owed to Barrasso (T91-94). Mancinelli stated that in the years since those incidents he had always avoided Barrasso because he was afraid of him (T92). In the later part of October, DiMeo told Mancinelli that he no longer had Mancinelli's "account," that Barrasso had the "account" and there was now interest owed on the money (T95). Mancinelli understood this to mean that DiMeo had either sold the "account" to Barrasso or that Barrasso was now the "collector" for the money owed to DiMeo (T96). At that point Mancinelli became worried as a result of his previous experience with Barrasso (T96). In November, a man, identified as the co-defendant Anastasia, came to Mancinelli's house and asked him to go out in his car to talk to his boss, whom he identified as Chubby. Mancinelli refused to go out but agreed instead to talk to Chubby on the phone, which he did, resulting in a heated discussion about the money owed (T98). During that conversation DiMeo stated that Anastasia worked for him (T99). Mancinelli said that during this period of time he spoke to his wife about the fact that he owed money. He also

stated that Barrasso's name came up during his conversations with his wife (T99). During the latter part of December, a few days before Christmas, after a heated argument with DiMeo on the phone, DiMeo came to Mancinelli's house where they had some angry words concerning the debts (T100). DiMeo also came to Mancinelli's house on Christmas day and again they talked of the debt (T101).

During the latter part of January, 1973, DiMeo again spoke with Mancinelli on the phone. He told Mancinelli that he was going away and that, when he did, two men were going to come into his house, were going to break the door down and "they are going to bust you wide open and send you to the hospital" (T102). This conversation put Mancinelli in great fear. During February 1973, Mancinelli said that the defendant Bruce Margo and another man came to his home and beat him severely (T106-108). A few days after the beating Mancinelli spoke with DiMeo again. He told DiMeo about what had happened, reminding him that this was just as DiMeo had predicted in their earlier phone conversation, and DiMeo responded that it must have been a coincidence. He denied any connection with the beating (T112). Subsequently, Mancinelli received some telephone calls from "Mattie Brown," identified as the defendant Bruce Margo, in which he was informed that Margo was calling to collect the money owed to DiMeo. The sum of $3,700 was demanded (T113). Mancinelli identified the man on the phone as the man who had come to his house and beat him up (T113-114). Mancinelli testified that commencing in late March he began to record all of his telephone conversations (T117). He stated that the FBI came into the case in early March (T118). In the latter part of March the defendant Margo once again came to

Mancinelli's house and demanded the $3,700 that was owed to DiMeo (T118-119).

The tape recordings of the conversations that Mancinelli had with various defendants were played for the jury, who were provided transcripts of the calls to assist them. The first conversation played was a telephone call between Mancinelli and DiMeo on March 27 (T231-235). During that call it was suggested by DiMeo that Barrasso was using his name (T231). However, DiMeo, in substance, insisted that he had nothing to do with the collection of the money owed by Mancinelli. Mancinelli called DiMeo on several occasions that day, but did not reach him until late in the evening (T237-239). At that time they had a conversation (T240-242), during which DiMeo indicated, in response to a question by Mancinelli that he had gotten in touch with Barrasso "or his enforcers." On March 29 Mancinelli recorded a conversation in person with the defendant Anastasia, by means of a body device (T246-260). During that conversation, Anastasia stated that he was "Chubby's Man." Also during that talk, Anastasia indicated that DiMeo was partners with Barrasso (T249-250). At several points during the conversations, Anastasia indicated that Barrasso was a "hothead" (T253-254). During this conversation the two men discussed a settlement of the $3,700 debt and it was finally agreed that $2,000 would be acceptable in full satisfaction of the account (T258). On the following day, March 30, Mancinelli recorded a conversation with Anastasia on the phone (T268-284). Mancinelli, during that call, indicated that he would be willing to pay the $2,000 but he insisted that he would only give it to Margo and Barrasso if they came to his house (T270). Anastasia indicated that he had discussed the $2,000 figure with

Barrasso (T271), who did not agree with the idea of accepting that amount in settlement of the debt (T277). On the same date, there was another subsequent telephone call with Anastasia (T286-298), who indicated that he had spoken with Barrasso, who had said he would now "handle it his way" (T287). Mancinelli once again stated that if Barrasso would not meet personally with him, he would not get any money (T293-294). Anastasia allegedly relayed Barrasso's statement to Mancinelli that "they are going to cut you in half with a shot-gun blast" (T294). On April 2, Mancinelli received a call from Mattie Brown, previously identified as the defendant Margo (T301-305). During that call Margo stated that DiMeo had nothing to do with the collection anymore, but "this is my money now" (T301). Margo threatened Mancinelli during this conversation. He also said that Barrasso and DiMeo worked for him (T302-303). Mancinelli once again insisted that he wanted to talk to Barrasso, and Margo concluded the call by stating that he would have Barrasso call him (T304-305). On the following day, Mancinelli called DiMeo again (T310-312). Subsequently, on that day, Mancinelli received another call from Margo (T312-315). During that call Margo stated that he would come to Mancinelli's house to collect the money that evening (T315). Prior to the meeting Mancinelli met with FBI agents who outfitted him with a body recorder and also gave him money (T319-328). During that conversation it was stated that Barrasso was out of town and, furthermore, that he had "nothing to do with it" (T321). At the conclusion of that conversation, the FBI agents, who were hiding in Mancinelli's house, entered the room and arrested Margo and Anastasia.

On cross-examination Mancinelli admitted that he had never seen or spoken to Barrasso during the past seven years (T369-371, T386-388).

Doris Mann testified that she was married to Rocco Mann and was acquainted with the defendant Barrasso (T630). She stated that in November of 1972, Barrasso cam into the Kless Diner in Irvington, New Jersey where she worked (T630-631). Barrasso said, according to her testimony, that he was looking for "Rock" and that he was a partner of Chubby's. He also said that "Rock" owed him money and "he better get it up or I'll get him" (T631). She stated that she told her husband about this conversation, which frightened her due to the incident that had occurred several years before when Barrasso had allegedly threatened her husband (T632). On cross-examination, Mrs. Mann stated that the diner was crowded and quite busy at the time of her conversation with Barrasso. Indeed, Barrasso did not even sit down (T637).

Chester Barrasso, the brother of Biaggio Barrasso, testified as the first witness for the defense. He stated that sometime in the Fall of 1972 he had occasion to go to Kless' Diner with his brother and Nicholas Carrara (T847-848). They went there for breakfast, arriving at about 2:00 o'clock in the morning. The diner was quite crowded and they were standing and talking while waiting for a table (T848). While they were waiting, a waitress named Doris came by and was greeted by his brother, Biaggio Barrasso. Biaggio told the woman to "tell Hard Rock to give Chubby a call, will you please, Doris." At that point, the woman got very upset and began yelling and screaming. She wanted to know if the reason for her husband having to call Chubby was because of gambling. She asked whether her husband had been gambling again and she said she was not going to give him any more money. She was quite angry. Barrasso told her that he didn't know what it was about, but that her husband should just call Chubby (T849).

Nicholas Carrara testified that he was the president of a company manufacturing and selling battery additives. The defendant Biaggio Barrasso was an employee of his company (T853). In the Fall of 1972, he had gone to Kless' Diner with Barrasso. They arrived at the diner at about 1:30 or 2:00 o'clock in the morning. The diner was very crowded and they were waiting for a table when Barrasso spoke to one of the waitresses. He told her to have her husband get in touch with a gas station attendant named Chubby (T854-855). The woman questioned Barrasso as to whether it concerned a gambling debt and Barrasso replied that he did not know. He told her that he was only asked to relay the message but didn't know what it was about (T855). The woman then began to carry on, raising her voice and stating that "it's a gambling debt." Carrara stated that he was embarrassed over the entire incident inasmuch as the restaurant was crowded at the time (T855). On cross-examination, it was elicited that Mr. Carrara considered Barrasso a friend and he also stated that Chester Barrasso was likewise employed by his business (T857).

The only other witnesses presented on behalf of the defendant Barrasso were for the purpose of contradicting testimony given by Mancinelli concerning one of the incidents seven years earlier involving him and Barrasso.

The co-defendant John DiMeo testified in his own behalf. Without relating DiMeo's testimony in detail, it was generally exculpatory. DiMeo denied that he had ever been a partner with Barrasso in any type of gambling enterprise (T894). He said that he only used Barrasso's name because Mancinelli had threatened him (T894). He did testify that he had asked Barrasso to ask Mancinelli's wife to have her husband call him (T962).

REASONS FOR GRANTING THE WRIT

As shown above, the evidence against petitioner was, with one isolated exception, in the form of hearsay statements made by other defendants in their taped conversations with Marcello. In charging the jury the court said:

> "Whether or not a defendant was a member of the conspiracy must be determined upon the evidence that you have heard as to his own actions, conduct, statements and declarations as well as his own connection with the acts and conduct of the other alleged co-conspirators. *You may in addition consider and weigh the acts and declarations of the other co-conspirators bearing on the question of a defendant's membership in the conspiracy.*
>
> In short, whether or not a defendant is a member of a conspiracy may be determined upon the reasonable inference to be drawn from all of the evidence in the case including the evidence that you have heard as to his own actions, his own conduct, his own connection with the acts and conduct of the other alleged co-conspirators." (Emphasis added.)

In charging the jury, the court was apparently following the rule of Second Circuit law adopted by the Third Circuit

in *United States v. Bey*, 437 F.2d 188, 191-192 (3rd Cir. 1971); see also, *United States v. Van Orden*, 469 F.2d 461, 464 (3rd Cir. 1972). Under that approach the trial judge must determine, when all the evidence is in, whether the prosecution has proved participation in the conspiracy by the defendant against whom hearsay evidence is offered by a fair preponderance of the evidence independent of the hearsay. If so, then the hearsay utterances go to the jury along with all the other evidence to be used in determining whether the particular defendant has been shown to be a member of the conspiracy by proof beyond a reasonable doubt.

Many circuits do not follow this approach to the hearsay problem, taking the view, rather, that the jury:

> ". . . must first determine whether the existence of a conspiracy was proved, and then determine from the acts and declarations of each defendant whether he became a participant in that conspiracy; and that contingent upon the jury's finding, beyond a reasonable doubt, that both such facts were proved, then the acts and declarations of each co-conspirator were admitted against all who the jury found to have joined in the conspiracy." *United States v. Rizzo*, 418 F.2d 71, 82 (7th Cir. 1969), *cert. denied*, subm. nom. *Tornabene v. United States*, 397 U.S. 967, 90 S. Ct. 1006, 25 L. Ed. 2d 260 (1970).

(Cont'd)
(2d Cir. 1969); *United States v. Stromberg*, 268 F.2d 256, 265-266 (2d Cir. 1959), *cert. denied, sub. nom., Lessa v. United States*, 361 U.S. 863, 80 S. Ct. 119, 4 L. Ed. 2d 102 (1959).

Accord, *United States v. Bessessen*, 433 F.2d 861, 866 (8th Cir. 1970); *Reistroffer v. United States*, 258 F.2d 379, 387 fn. 3 (8th Cir. 1958); *United States v. Grow*, 394 F.2d 182, 203 (4th Cir. 1968), *cert. denied*, 393 U.S. 84, 89 S. Ct. 118, 21 L. Ed. 2d 111 (1968); *United States v. Dennis*, 346 F.2d 10, 16 (10th Cir. 1965) *reversed*, 384 U.S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 973 (1966); *United States v. Ushakow*, 474 F.2d 1244, 1245 (9th Cir. 1973); *United States v. Griffin*, 434 F.2d 978, 984 (9th Cir. 1970), *cert. denied*, 402 U.S. 995, 91 S. Ct. 2170, 29 L. Ed. 2d 160 (1971); *United States v. King*, 474 F.2d 1, 9 (9th Cir. 1972).[4] Indeed, it has been held that the failure to give a charge such as that set out in *United States v. Rizzo, supra*, constitutes reversible error. *United States v. Landers*, 304 F.2d 577, 582 (5th Cir. 1962). Nor have the Second and Third Circuit approaches been without eloquent critics in their own domain. In *United States v. Colarco*, 424 F.2d 657, 661-665 (2d Cir. 1970), *cert. denied*, 400 U.S. 824, 27 L. Ed. 2d 53, 91 S. Ct. 47 (1970), Judge Dooling pointed out, in dissent, that the rule unfortunately permits the jury to consider hearsay evidence "to the point, indeed, of using it to 'tip the scale' in a case in which the independent evidence might not convince the jury of guilt." *Id.* at 664. He concluded that the "aim and effect of the procedure are to dilute the reasonable doubt requirement — a due process exaction." *Id.* He went on to ask:

> "But does not basic fairness require that the jury be told at once that the declaration is not evidence that the absent defendant was a participant in the crime and will never become such no matter what other evidence is brought in? The declaration as a verbal act may become, perhaps, the responsibility of the absent defendant as a proved participant in the offense, but in an evaluation of the proofs in the legal perspective, it cannot contribute to a finding that he was a party to the corrupt program." *Id.* at 665.

4. It is conceded that some confusion apparently exists in the Ninth Circuit cases. See *Carbo v. United States*, 314 F.2d 718, 735-738 (9th Cir. 1963), which reflects the Second Circuit approach.

Judge Dooling's complaint is echoed by the petitioner in this case. It is hard to imagine a more perfect example of the unfairness inherent in the Second Circuit formulation. Here the sole non-hearsay evidence linking Barrasso to the conspiracy was the incident with Mrs. Mann in the Kless Diner. Not only was her credibility open to considerable doubt but the defendant presented two witnesses who disputed her version of the event. It is not difficult to believe that the jury might have entertained a reasonable doubt about this critical meeting yet, under the charge of the court, it was well-nigh impossible that, even with such a doubt, they would acquit Barrasso due to their consideration of the numerous and prejudicial hearsay statements on the question of his guilt. Is it not fair, is it not appropriate, that in such a case the jury's attention should somehow be focused upon the non-hearsay evidence for an initial determination of whether it is believed beyond a reasonable doubt? Otherwise, as here, the jury may not be convinced of the government's version of the independent, non-hearsay evidence but may still go on to convict the defendant based upon the hearsay. This would present a classic situation where "hearsay would lift itself by its own bootstraps to the level of competent evidence." *Glasser v. United States*, 315 U.S. 60,

75, 86 L. Ed. 680, 62 S. Ct. 457 (1942). Indeed, it is impossible to say that this jury did not base its verdict against Barrasso solely upon the hearsay statements, for they were explicitly told that they could do so. "Basic fairness" requires that this not be permitted to happen. Mr. Justice Jackson focused upon this precise danger in his famous concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, 453 (1949), when he said:

> "As a practical matter, the accused is often confronted with a hodegpodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of the existence of the conspiracy itself. In other words, a conspiracy is often proved by evidence that is admissible only upon the assumption that conspiracy existed."

Judge Adams of the Third Circuit has also expressed misgivings concerning the ramifications of the *Bey* decision in which he had joined. *United States v. Rodrigues*, 491 F.2d 663, 667 n. 10 (3rd Cir. 1974) (concurring opinion). There Judge Adams said:

> "Particularly nettlesome is the question whether *Beys* rejection of the need for certain limiting instructions comports altogether with the Supreme Court's pronouncements on the co-conspirator rule. See, *e.g.*, *Krulewitch v. United States*, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790 (1949). (Particularly the concurring opinion of

> Justice Jackson); *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942). For example, if under *Bey*, the jury need not find at least a *prima facie* case of conspiracy on the basis solely of independent evidence, the very bootstrapping effect warned against in *Glasser*, 315 U.S. at 75, 62 S. Ct. 457, may occur."

It is urged that this Court grant certiorari to resolve this conflict between the Circuits in an important area of conspiracy law which arises in every conspiracy case tried in the federal courts. Considering the minimal amount of non-hearsay evidence involving petitioner, this case presents an excellent vehicle for such review.[5]

2. Despite the admission of these numerous hearsay statements[6] the court at no time gave any cautionary instruction as to the manner in which the jury was to treat this type of evidence. Such a failure was directly contrary to the rationale set forth by this Court in *Lutwak v. United States*, 344 U.S. 604, 618-619, 73 S. Ct. 481, 490, 97 L. Ed. 593 (1953), where it was said:

> "These declarations must be carefully and clearly limited by the court at the time of their admission

5. No objection was taken to this aspect of the trial court's charge. Nonetheless, this is not a case where an objection might have given the court a chance to change its mind. Under the controlling precedent of *United States v. Bey*, *supra*, the court was bound to charge as it did, whether there was an objection or not. Furthermore, there can be no doubt that if error, there was "plain error" here. *United States v. Carter*, 401 F.2d 748, 750 (3rd Cir. 1968), in which the Third Circuit adopted the test set forth in *Kotteakos v. United States*, 328 U.S. 750, 764-765, 66 S. Ct. 1239, 1248, 90 L. Ed. 1557 (1946).

6. See, *e.g.*, 11a-17a, 17a-18a, 19a, 20a, 21a, 22a, 23a-24a, 25a, 26a-27a, 28a-29a.

> and the jury instructed as to such declaration and the limitations put upon them."

The Courts of Appeals have held that a failure to give such cautionary instructions constitutes reversible error. *United States v. Appollo*, 476 F.2d 156, 162-164 (5th Cir. 1973); *United States v. Fabian*, 358 F.2d 187, 192 (8th Cir. 1966), *cert. denied*, 386 U.S. 821 (1966), *United States v. Dennis*, 346 F.2d 10, 16 (10th Cir. 1965), *reversed*, 384 U.S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 973 (1966).

The Court in *United States v. Appollo, supra*, 476 F.2d at 163, said that such instructions were needed for the purpose of:

> ". . . explaining clearly to the jury the requirement that the conspiracy itself and each defendant's participation in it must be established by independent non-hearsay evidence which must be given either prior to the introduction of any evidence or immediately upon the first instance of such hearsay testimony." *Id.* at 163.

While the hearsay may precede the so-called "evidence aliunde" in order of proof, as it did here with respect to Barrasso, this very possibility "highlights the need for the court to condition the mind of the jurors so that they will not fail to remember that none of this hearsay will bootstrap the necessary establishment of the conspiracy by firsthand proof." *United States v. Appollo, Id.* As the court said there, in rejecting a contention that the harm could be cured by a proper charge,

"this delicately dangerous defusing must be firmly in the jury's mind when the hearsay is proffered." *Id.*[7]

This question is closely related to the issue raised above, in that it may be argued that if a jury can in its deliberations consider hearsay in determining a defendant's membership in a conspiracy, then there is no need for a cautionary instruction at the time the hearsay evidence is received. Indeed, *United States v. Bey, supra*, 437 F.2d at 191-192, itself rejected the necessity for limiting instructions under the Second Circuit approach. These decisions are not only unfair, as this case proves, but seriously undermine this Court's prior opinions concerning conspiracy.

3. As noted heretofore, Mancinelli was permitted to testify concerning two incidents involving himself and Barrasso some seven years before (12a-17a).[8] Doris Mann was also permitted to

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7. No objection was made concerning this failure on the part of the trial judge and therefore this contention must be assessed as "plain error." The devastating nature of this hearsay and its overwhelming significance in the case clearly establishes that any error must have influenced the jury to a great degree. *United States v. Carter*, 401 F.2d 748, 750 (3rd Cir. 1968). It must be remembered that the hearsay included such highly prejudicial material as references to "Barrasso or his enforcers" (21a) and that Barrasso allegedly said:

> "They're going to cut ya in half with a shot-gun blast" (29a).

Nor can it be disputed that the hearsay evidence as to Barrasso far outweighed the non-hearsay proof in the form of Mrs. Mann's brief testimony concerning the incident in the diner. When the prejudicial nature of the hearsay is weighed alongside its central role in this case, one is left with scant doubt that the failure to adequately caution the jury in this regard constituted plain error affecting substantial rights of this defendant. Once again, however, under the controlling precedent of *United States v. Bey, supra*, an objection would have done no good.

8. One of these incidents was also mentioned by Mancinelli in one of the tape recordings (T297).

go into one of those incidents on her direct examination (35a). There can be no doubt that, if Mancinelli were believed, those prior events constituted wrongdoing, in the form of extortion or robbery, on the part of Barrasso.

It is well-settled that such evidence of other unrelated wrongdoing on the part of a defendant is highly prejudicial and inadmissible. *Virgin Islands v. Oliver*, 360 F.2d 297 (3rd Cir. 1966). Here, however, the evidence of these two prior acts was apparently deemed admissible under the so-called "state of mind" exception which arises in cases involving extortion. *United States v. DeCarlo*, 458 F.2d 358, 367 (3rd Cir. 1972), *cert. denied*, 409 U.S. 843 (1973); *United States v. Stirone*, 311 F.2d 277, 280 (3rd Cir. 1962), *cert. denied*, 372 U.S. 935 (1963), *rehearing denied*, 372 U.S. 981 (1963). The government apparently sought to prove by this evidence that the mere use of Barrasso's name caused fear in Mancinelli and that his alleged threat to Doris Mann in the diner likewise placed her in fear.

While defendant does not here challenge the admissibility of such evidence,[9] it is likewise settled that the introduction of such "other crime" evidence, going to some limited issue, should always be accompanied by a cautionary instruction to the jury clearly and carefully explaining the restricted purpose for which they may consider such evidence. *United States v. McClain*, 440 F.2d 241, 245-246 (D.C. Cir. 1971); *United States v. Stirone*, *supra*, 311 F.2d at 281; *Dancy v. United States*, 276 F.2d 521 (D.C. Cir. 1960); *Orloff v. United States*, 153 F.2d 292 (6th Cir. 1946). Such an instruction can be given either at the time the evidence is introduced or in the charge. *United States v. Fench*,

9. The remoteness of these prior events raise grave doubts as to whether the prejudice engendered by this evidence did not far outweigh its probative value.

470 F.2d 1234 (D.C. Cir. 1972); *United States v. Alfano*, 152 F.2d 395, 397 (3rd Cir. 1945). Indeed, the potential prejudice of such evidence is sometimes such that no limiting instruction can cure the harm. *United States v. DiCicco*, 435 F.2d 478 (2nd Cir. 1970). Judge Aldisert stated the rule perfectly in *United States v. DeCarlo*, *supra*, 458 F.2d at 373 (dissenting opinion):

> "It may have been discretionary for this court to have received this state-of-mind evidence, but once the discretion was exercised and the evidence admitted, a mandatory duty descended upon the court to inform the jury that they did not have unfettered use of this evidence and that it had to be utilized for a limited purpose only."

Indeed, this principle is so well-accepted that the government, in a trial brief submitted in this very case (87a-91a) cited *United States v. Dutsch*, 357 F.2d 331 (4th Cir. 1966), a decision where an earlier threat was permitted in evidence, and the government said about that case:

> "The trial court in permitting this testimony carefully charged the jury on the limited use of this earlier threat" (89a).

Here, no instruction was given at the time the evidence was introduced or in the charge.[10] This omission raises a serious

10. Strangely, the government requested a charge which would have included such a limitation. However, the court denied the request (9a). (The difference in names in the government's request is explained by the fact that the request was from another trial and apparently there was insufficient time to have them retyped (T963-968).

question as to whether petitioner was accorded his right to due process of law under the Fifth Amendment which should not go unreviewed by this Court.[11]

CONCLUSION

Wherefore, for the reasons set forth herein, this petition for a writ of certiorari should be granted.

Respectfully submitted,

s Harvey Weissbard
Attorney for Petitioner

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11. While this omission was never brought to the court's attention it is urged that it was so prejudicial as to constitute plain error under the authorities discussed heretofore. See also *United States v. McClain, supra*. It cannot be forgotten that these prior incidents constituted the only direct contact between Mancinelli and Barrasso that was brought out in this entire case. If the jury believed Mancinelli's version of these events seven years before, the prejudice cannot be overstated. As discussed above, the case against Barrasso rested upon the brief contact between he and Mrs. Mann in the diner. This evidence of other crimes, given to the jury without guidance or limitation, may well have tipped the balance against Barrasso, particularly when considered along with the hearsay discussed earlier. Under such circumstances, the plain error rule should be invoked.

APPENDIX A

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment V — No person shall . . . be deprived of life, liberty, or property, without due process of law.

Amendment VI — In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

STATUTES INVOLVED

18 U.S.C. Section 894 — Collection of extensions of credit by extortionate means.

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than 20 years or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person

against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

* * *

APPENDIX B

JUDGMENT ORDER

(Filed March 10, 1975)

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 74-2162

UNITED STATES OF AMERICA

v.

BIAGGIO BARRASSO,
BRUCE MARGO
ARTHUR ANASTASIA
JOHN DI MEO

Biaggio Barrasso,

Appellant

On Appeal from the United States District Court for the District of New Jersey
Crim. No. 409-73

Argued March 5, 1975

Before: ADAMS, ROSENN and WEIS, *Circuit Judges.*

Appendix B

After considering all the contentions asserted by appellant, namely: (a) the court's treatment of hearsay evidence concerning Barrasso both during the trial and in its charge constituted prejudicial error; (b) the court failed to give any cautionary instruction at the time the hearsay statements were received in evidence; (c) the court's charge that the jury could consider the hearsay evidence against Barrasso in determining whether he was a member of the conspiracy was error; (d) the court's failure to make a finding that Barrasso was shown to be a member of the conspiracy by a fair preponderance of the non-hearsay evidence before submitting the hearsay declarations to the jury for consideration was error; (e) remarks made by the government attorney in summation constituted prejudicial error requiring reversal; (f) the court's failure to give any cautionary instruction concerning the limited use to be made by the jury of other crime evidence introduced against Barrasso constituted prejudicial error; (g) the variance concerning Doris Mann's correct name prejudiced the defendant in light of the unfair manner in which the government sought to attack defendant's evidence concerning the Kless Diner incident; (h) the court's reference to congressional motives in its charge was improper and prejudicial; (i) the trial court erred in denying defendant's motion for a mistrial based on the testimony of the government witness Paul Pallitz; and (j) the manner in which the trial court extensively questioned the defendant, DiMeo, constituted prejudicial error, it is

Appendix B

ADJUDGED AND ORDERED that the judgment of the district court be and the same is hereby affirmed.

BY THE COURT,

s/ Alan M. Adams
Circuit Judge

ATTEST:

s/ Thomas F. Quinn
Thomas F. Quinn
Clerk

DATED: March 10, 1975

Supreme Court, U. S.
FILED
JUL 16 1975
MICHAEL RODAK, JR., CLERK

No. 74-1261

In the Supreme Court of the United States

OCTOBER TERM, 1975

BIAGGIO BARRASSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1261

BIAGGIO BARRASSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court committed plain error (1) in instructing the jury that a defendant's membership in a conspiracy can be established by all the evidence in the case, including the acts and statements of co-conspirators; (2) in not giving cautionary instructions at the time that statements of co-conspirators were admitted; and (3) in not giving *sua sponte* a limiting instruction concerning the use of concededly admissible evidence of prior misconduct.

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiring to use extortionate means to collect an extention of credit, in violation of 18 U.S.C. 894.[1] He was sentenced to four years' imprisonment. The court of appeals affirmed (Pet. App. B, 3a-5a).

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[1]Bruce Margo, Arthur Anastasia, and John DiMeo were also indicted as co-conspirators. Margo's case was severed prior to trial due to his illness and Anastasia's was severed during trial, following which he pled guilty. DiMeo was found guilty, and the court of appeals affirmed his conviction. He has not sought further review.

In August 1972, Rocco Mancinelli began placing bets with co-defendant DiMeo (Tr. 82-84) and paid $9,000 in losses (Tr. 87A-88). Despite having exhausted his funds, Mancinelli continued to place bets and by October 1972 owed DiMeo $2,400 (Tr. 88).

DiMeo requested payment (*ibid.*). He told Mancinelli in person that petitioner was his "partner" (Tr. 89). Because of his past experiences with petitioner, Mancinelli was disturbed (Tr. 89-90).[2]

Later in October, DiMeo told Mancinelli that petitioner "[had] the account and there's weight on the account" (Tr. 95). Mancinelli understood this to mean that the debt had been sold for collection to petitioner, who would require Mancinelli to pay interest on it (Tr. 95-96). In November 1972, petitioner personally visited Mancinelli's wife, identified himself as DiMeo's partner, and warned that her husband "owes me money and he better get it up or I'll get him" (Tr. 631).

In January 1973, DiMeo telephoned Mancinelli and told him that "two men are going to come into your house, they're going to break the doors down and they're going to bust you wide open and send you to the hospital" (Tr. 101-102). The following month, co-conspirator Margo and another man forced their way into Mancinelli's home and

[2]Mancinelli testified that he had placed a $200 bet with petitioner seven years earlier, but had only paid petitioner $100 when he lost. A few weeks later, while picking up his wife outside her place of employment, Mancinelli saw petitioner nearby brandishing a gun (Tr. 91). When Mancinelli and his wife drove away, petitioner followed in his car. Unable to elude petitioner, Mancinelli finally stopped, and his wife talked to petitioner, who had parked behind them. She then gave petitioner all the money that she had earned that day (Tr. 92, 632). Mancinelli also testified that a few months later, while sitting in a bar, petitioner "grabbed me by the throat, muscled me around, and demanded $200" (Tr. 93), leading Mancinelli to pay petitioner $200 he borrowed from a friend (Tr. 93-94).

severely bludgeoned him (Tr. 106-108, 112). On March 6, Margo telephoned Mancinelli and demanded payment of the debt owed DiMeo, which was then said to be $3,700 (Tr. 113).

During late March and early April, DiMeo, Margo, and co-conspirator Anastasia repeatedly spoke to Mancinelli, both in person and by telephone, about payment of the debt (Tr. 226, 229-235, 240-242, 246-260, 268-284, 286-298, 301-305, 310-312, 313-315). In these conversations, tape recorded by Mancinelli, the three co-conspirators frequently alluded to petitioner's interest in collecting the debt (Tr. 250, 253-254, 268, 271, 277, 287, 293-294, 302-303). Then, when Margo and Anastasia went to Mancinelli's house on April 3 to collect the debt, federal agents arrested them (Tr. 328, 619).

1. Petitioner contends (Pet. 12-17, n. 5) that the trial court committed "plain error" when, without objection, it instructed the jury, consistently with prior decisions of the court of appeals,[3] that it could consider declarations of his alleged co-conspirators in determining whether he was a member of the alleged conspiracy.[4] Petitioner contends,

[3]See, *e.g.*, *United States* v. *Bey*, 437 F.2d 188, 191-192 (C.A. 3); *United States* v. *Van Orden*, 469 F.2d 461, 464 (C.A. 3); *United States* v. *Rodrigues*, 491 F.2d 663, 666 (C.A. 3).

[4]The court instructed (Jury Instructions, Tr. 22):

> Whether or not a defendant was a member of the conspiracy must be determined upon the evidence that you have heard as to his own actions, conduct, statements and declarations as well as his own connection with the acts and conduct of the other alleged co-conspirators. You may in addition consider and weigh the acts and declarations of the other co-conspirators bearing on the question of a defendant's membership in the conspiracy.
>
> In short, whether or not a defendant is a member of a conspiracy may be determined upon the reasonable inference to be drawn from all of the evidence in the case including the evidence that you have heard as to his own actions, his own conduct, his own connection with the acts and conduct of the other alleged co-conspirators.

in substance, that the trial court, *sua sponte*, should have ignored the controlling decisions of the court of appeals and should instead have given the charge now proffered by petitioner (but not proffered to the trial court), endorsed by several other courts of appeals.[5] Under that charge, before it can consider declarations of co-conspirators, the jury must find beyond a reasonable doubt, on the basis of independent non-hearsay evidence, that a conspiracy existed and that the defendant joined it.

However, if petitioner wished to challenge the rule previously adopted by the court of appeals (and by the Second and Ninth Circuits[6]), under which the jury may consider such declarations if the trial court first determines that the independent evidence establishes those facts by a fair preponderance, he had the obligation to raise the issue in the trial court by objecting to the charge given and tendering a charge reflecting what he now claims should be the law. His failure to do so bars him from raising the issue on appeal or in this Court. Indeed, the court of appeals' *per curiam* affirmance may merely reflect that fact. In any event, there is no showing that the issue is sufficiently important that the conflict among the circuits requires resolution by this Court. The issue does not affect fundamental rights, but concerns only the allocation between judge and jury of the responsibility for determining whether threshold

[5]See, *e.g.*, *Reistroffer* v. *United States*, 258 F.2d 379, 387, n. 3 (C.A. 8); *Dennis* v. *United States*, 346 F.2d 10, 16 (C.A. 10), reversed on other grounds, 384 U.S. 855; *United States* v. *Grow*, 394 F.2d 182, 203 (C.A. 4), certiorari denied, 393 U.S. 840; *United States* v. *Rizzo*, 418 F.2d 71, 82 (C.A. 7), certiorari denied *sub nom. Tornabene* v. *United States*, 397 U.S. 967.

[6]*E.g.*, *United States* v. *Projansky*, 465 F.2d 123, 137-138 (C.A. 2), certiorari denied, 409 U.S. 1006; *Carbo* v. *United States*, 314 F.2d 718, 735-738 (C.A. 9), certiorari denied, 377 U.S. 953. But cf. *United States* v. *King*, 472 F.2d 1, 9 (C.A. 9).

conditions of admissibility are met for certain types of evidence, a matter that need not be uniformly resolved among the circuits.

2. Petitioner also challenges (Pet. 17-19) the trial court's failure to give *sua sponte* a limiting instruction concerning the declarations of co-conspirators when such evidence was received. Petitioner did not object to such evidence or request such an instruction. Moreover, as petitioner acknowledges (Pet. 19), under prior decisions of the court of appeals such an instruction was unnecessary because it is for the judge, not the jury, to make the determination that there is sufficient independent evidence of the defendant's membership in the alleged conspiracy to render admissible the declarations of co-conspirators. See, *e.g.*, *United States* v. *Bey*, *supra*, 437 F.2d at 191-192.[7] The failure to give such an instruction was not "plain error," and petitioner's failure to seek it is fatal to his effort to press the issue in this Court.

3. Mancinelli testified about petitioner's prior extortionate collections of credit from him. Although he did not object to this evidence at trial and does not now contest its admissibility (Pet. 20),[8] petitioner contends that the

[7]*Lutwak* v. *United States*, 344 U.S. 604, on which petitioner relies (Pet. 17-18), is not to the contrary. While the Court stated that the trial court must limit the admissibility of declarations of co-conspirators at the time of their admission in evidence, the only such declaration involved there had been objected to (Record, *Lutwak* v. *United States*, October Term 1952, No. 66, p. 208) and the court's charge imposed upon the jury, rather than the judge, the responsibility of determining whether there was sufficient independent evidence to show that a defendant participated in the conspiracy (*id.* at 337-338).

[8]The evidence was properly admitted both to show Mancinelli's state of mind regarding petitioner's use of extortionate means to collect debts (see, *e.g.*, *United States* v. *Frazier*, 479 F.2d 983, 986 (C.A. 2); *United States* v. *DeCarlo*, 458 F.2d 358, 367 (C.A. 3) (*en banc*), certiorari denied, 409 U.S. 843), and to show a plan, scheme, intent, or *modus operandi* of the conspirators. See, *e.g.*, *United States* v. *Chrzanowski*, 502 F.2d 573, 575 (C.A. 3); *United States* v. *Bonanno*, 467 F.2d 14, 17 (C.A. 9), certiorari denied, 410 U.S. 909.

court erred in failing to instruct the jury that the evidence was received for limited purposes. Petitioner did not request such an instruction (Tr. 963-968) and its omission was not plain error. *E.g., United States* v. *Carter*, 401 F.2d 748, 750 (C.A. 3), certiorari denied, 393 U.S. 1103. In any event, neither the omission of the instruction nor the propriety of applying the "plain error" rule in these circumstances presents a question warranting further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.